National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 31, 1998

TO: James J. McDermott, Regional Director, Region 31

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Mike Hammer Productions, Case 31-CA-23033

512-7550-0143, 524-8351-3700, 524-8387-2600

This Section 8(a)(3) case was submitted for advice as to whether an employee was engaged in protected activity when she told the union that the employer had received a fax about possible strike replacements.

FACTS

Mike Hammer Productions (the Employer) is a non-union film production company. During the summer of 1997,[(1)] the International Alliance of Theatrical Stage Employees (the Union) attempted to organize employees of the Employer. On September 16, the Union commenced a strike and engaged in recognitional picketing. Virtually all non-supervisory employees joined the strike, as did several supervisors. The Employer immediately began efforts to find strike replacements.

Charging Party Carmen Castillo worked for the Employer as a production assistant. Castillo was not a union member, did not participate in the strike, and would not have been included in the unit sought by the Union. Castillo's duties consisted of answering the telephone and typing and circulating memos and other correspondence regarding the progress of production and production decisions.

Shortly after the strike began, striker John Hurn, who apparently had pro-management sympathies, faxed a one-page memo to the Employer listing the names of possible strike replacements whom the Employer could contact. Hurn's fax was not accompanied by a cover sheet, nor was it otherwise marked as confidential, and the Employer did not have a confidentiality policy. Castillo found the memo by the fax machine, which was located in the copy machine area of the production office and used by all employees, and delivered it to the addressee, Production Manager Bob Perkis.

Striker Dave Sammons telephoned Castillo that evening. During their conversation, Castillo told Sammons that Hurn had faxed Perkis a list of potential strike replacements, though she denies revealing the listed names or providing a copy of the list to Sammons. The Employer asserts that subsequent to this conversation, the Union made threatening telephone calls to listed individuals as well as to Hurn. On September 22, Castillo was terminated for disloyalty in disclosing information to the Union concerning the Employer's efforts to hire replacements.

ACTION

We conclude that Castillo's disclosure was unprotected and thus the Section 8(a)(3) charge should be dismissed, absent withdrawal.

The Board has found that the disclosure of certain types of information, even if otherwise concerted and protected, may involve such disloyalty to an employer that the disclosure falls outside the protection of Section 7. In making these determinations, two considerations are emphasized: (1) whether the information being passed on was wrongfully obtained;[(2)] or (2) whether the information passed on is that which the employer has a right to expect will be treated as confidential, and therefore the disclosure is fundamentally a breach of trust.[(3)]

The Board has found that whenever employees wrongfully obtain information, the employees' passing on of such information is not activity protected under the Act. In Roadway Express,[(4)] the Board found unprotected an employee's surreptitious removal of bills of lading from the employer's records and furnishing of copies to the union to support a claim that the employer was assigning bargaining unit work to non-bargaining unit employees. The employee had not obtained prior approval or authorization to copy the information, and the information had been kept in files in an office with limited access. However, in Ridgley Mfg. Co.,[(5)] the Board adopted the ALJ's finding that an employee's attempt to write down and/or memorize employee names and addresses from timecards for the union's use in organizing activity was protected by the Act. According to the ALJ in Ridgley,

employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer's private or confidential records.[(6)]

Castillo clearly obtained the transmitted data in the normal course of her work activities and the Employer does not dispute this conclusion. Delivering incoming faxes was part of Castillo's job. Thus, the information was not wrongfully obtained.

Thus, the next questions are (1) whether the information passed on was that which the Employer had a right to *expect* would be treated as *confidential*, and (2) if so, whether the dissemination was fundamentally a breach of trust.

In determining whether an employer has the right to expect material to be treated as confidential, the Board considers whether an employer has taken measures to prohibit and prevent disclosure. For example, in International Business Machines Corp.[(7)] the Board upheld the discharge of an employee who disclosed wage information in violation of a rule[(8)] regarding confidential company-compiled wage data. The Board found that the employee knew that the documents had been classified as confidential, was aware of the company's rule prohibiting distribution of such material, and had not obtained the information under circumstances that would lead him reasonably to believe that his possession of the material was authorized.[(9)]

Conversely, in Gray Flooring[(10)] an employee who copied employees' names and telephone numbers from index cards was found to have engaged in protected activity because the employer had no announced confidentiality policy and the cards were not maintained in a place or manner that would indicate that management considered them to be confidential. Similarly, in L.G. Williams Oil Co.[(11)] a secretary who disclosed the salary of a prospective employee after receiving the information in a letter she was required to type was held to have engaged in protected activity because the employer had no announced confidentiality program and the letter was not marked as confidential.

Here, as in Gray Flooring and L.G. Williams Oil Co. and unlike in International Business Machines Corp., the Employer did not have a confidentiality rule.[(12)] Additionally, Hurn's fax was not accompanied by a cover sheet, nor was it otherwise marked as confidential, and the fax machine was located in the copy machine area and used by all employees, i.e., it was not maintained in a place or manner that would indicate that management considered incoming faxes to be confidential.

However, even in the absence of a confidentiality rule, an employer has a right to expect that certain information, due to the nature of its content, will be treated as confidential by employees.[(13)]

Unreleased, prospective strike procedures and strategy are types of labor relations information that employers entrust to confidential employees.[(14)] Thus, an employee could infer that such data is by nature confidential. Here, therefore, the Employer had a right to expect that a fax listing possible strike replacements would be treated as confidential by Castillo, the employee to whom it was entrusted, particularly in the midst of an ongoing strike.[(15)]

Additionally, in Bell Federal,[(16)] when a union officer asked members whether anyone knew about a certain possible company negotiator, a switchboard operator revealed that this individual had called the company's president a number of times that day. The ALJ, as adopted by the Board, found that the president had a "right to rely" on any employee who might be covering the switchboard to treat as confidential information about the employer's telephone calls.[(17)] Similarly, in this case the Employer had a right to rely on Castillo, or any other individual covering the fax machine during the strike, to treat as confidential the

identity of the individual faxing labor relations information to the Employer, as well as the content of the information.

In summary, the fax contained confidential information and therefore the Employer had a right to expect that Castillo would not disclose any information about the fax, including the identity of the person who had sent the fax (Hurn) and the fact that the fax contained a list of potential strike replacements. Castillo's disclosure of this information was fundamentally a breach of trust and therefore was unprotected.

For the foregoing reasons, the Section 8(a)(3) charge should be dismissed, absent withdrawal.

B.J.K.

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[1] All dates herein are from 1997.

[2] Roadway Express, 271 NLRB 1238, 1239 (1984).

[3] Bell Federal Savings & Loan Assn., 214 NLRB 75 (1974).

[4] 271 NLRB at 1239.

[5] 207 NLRB 193 (1973).

[6] Id. at 196-97.

[7] 265 NLRB 638, 638 (1982).

[8] Where a confidentiality rule is in place, the Board balances the employee's interest in disclosing the information and the employer's legitimate interest in confidentiality in order to determine the lawfulness of discipline pursuant to that policy. Beckley Appalachian Regional Hospital, 318 NLRB 907, 908-09 (1995) (citing Altoona Hospital, 270 NLRB 1179, 1180 (1984), which cites International Business Machines Corp., *supra*).

[9] See also Texas Instruments v. NLRB, 106 LRRM 2137, 2141 n.3, 2143 (1st Cir. 1981).

[10] 212 NLRB 668, 669 (1974).

[11] 285 NLRB 418, 419 (1987).

[12] Thus, no Beckley Appalachian balancing is required.

[13] See, e.g., Bell Federal Savings & Loan Assn., 214 NLRB at 76, 78 (no confidentiality policy or other indication that the disclosed information was confidential, yet disclosure held unprotected); see also Gray Flooring, 212 NLRB at 669 (in finding an employee who copied employees' names and telephone numbers from index cards was engaged in protected activity, the Board noted that there was nothing in the nature of the information on the cards to suggest that they were confidential).

[14] See Inland Steel Co., 308 NLRB 868, 874 (1992), where the Acting Regional Director, with Board approval, rejected the contention that a records retention technician was a confidential employee in part because the employer did not demonstrate that the employee had access to labor relations policy information, such as strike contingency plans, *before* they became known to the union; Firestone Synthetic Latex Co., 201 NLRB 347, 348 (1973), where the Board, while finding employees to

be confidential employees on other grounds, indicated that the typing of strike procedures would have been further evidence of confidential status. See also Bakersfield Californian, 316 NLRB 1211, 1213 (1995), where the Board found an employee was confidential because she had access to notes about the employer's bargaining strategy which, "if revealed to the Union, could seriously impair the Employer's ability to negotiate."

[15] Cf. Cello-Foil Products, 171 NLRB 1189, 1193 (1968) (Board held that disclosing "common knowledge" about what was going on in the plant during a strike was protected activity). We need not decide whether Castillo was a confidential employee.

[16] Bell Federal Savings & Loan Assn., 214 NLRB 75 (1974).

[17] The Board also accords confidential status to private management communications concerning terms and conditions of employment. See Canyon Ranch, 321 NLRB 937, 937 (1996).